90-430

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

ROOSEVELT DANIELS, et al.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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INDEX TO APPENDIX

	App. Page
United States v. Roosevelt Daniels, et al., 902 F.2d 1238 (7th Cir. 1990)	1
Order Denying Petition for Rehearing (7th Cir. June 11, 1990)	14
Transcript of Proceedings, February 27, 1987	15
Order Denying Petition for *Mandamus, Roosevelt Daniels, et al. v. Hon. James F. Holderman*, No. 87-1322 (7th Cir. March 5, 1987)	22
Transcript of Proceedings (portion), March 12, 1987	24
Transcript of Proceedings (portion), April 8, 1988	41
Order Denying Petition for *Mandamus, In The Matter of Roosevelt Daniels, et al.*, No. 88-1750 (7th Cir. April 25, 1988)	44
United States v. Roosevelt Daniels, et al., 848 F.2d 758 (7th Cir. 1988)	45
Transcript of Proceedings (portion), February 26, 1987	49
Order of Senior Judge Frank J. McGarr, Marked "Received" March 3, 1987	51
Minute Order of Senior Judge Frank J. McGarr, March 3, 1987	54
Government's Report to the Court Concerning the March 1986 Extension of the Term of Service of the Special October 1984 Grand Jury, March 9, 1987	55

Letter from Michael H. King to Senior Judge Frank J. McGarr, March 9, 1987 60

Letter from Senior Judge Frank J. McGarr to Michael H. King, March 10, 1987 63

Transcript of Proceedings (portion), April 22, 1987 . 65

In re: The Special October 1984 Grand Jury, Transcript of Proceedings, March 11, 1986 67

In re: The Special October 1984 Grand Jury, Transcript of Proceedings, March 18, 1986 69

In re: The Special October 1984 Grand Jury, Transcript of Proceedings, April 1, 1986 71

In the Matter of the Special October 1984 Grand Jury, Order, March 3, 1986 73

In the Matter of the Special October 1984 Grand Jury, Minute Order, March 3, 1986 74

Transcript of Proceedings (portion), September 2, 1986 75

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ROOSEVELT DANIELS, et al.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

UNITED STATES of America,
Plaintiff-Appellee,

v.

Roosevelt DANIELS, et al.,
Defendants-Appellants.

Nos. 89-2014, 89-2015, 89-2017, 89-2025 and 89-3176.

United States Court of Appeals,
Seventh Circuit.

Argued Jan. 18, 1990.

Decided May 10, 1990.

Rehearing and Rehearing En Banc
Denied June 11, 1990.

* * * * *

Before CUMMINGS, POSNER, and MANION, Circuit Judges.

POSNER, Circuit Judge.

The five defendants whose appeals we have consolidated were charged with large-scale federal drug offenses orchestrated by defendant Daniels, in part through telephone calls to the other defendants from the Metropolitan Correctional Center in Chicago, where he was awaiting trial for his drug activities. The evidence of guilt being overwhelming, the defendants pleaded guilty, reserving however several issues for appeal. Later they moved to set aside their guilty pleas, but Judge Holderman denied the motion and in 1989 sentenced the defendants to prison for terms ranging up to 55 years (for Daniels). Although the sentences are exceedingly long (especially since they are not subject to parole), the defendants' offenses were brazen, far-flung, and enormously profitable.

The principal issue is the validity of the indictment. Section 3331 of the Criminal Code places an eighteen-month limit on the life of a federal grand jury, unless the district court enters an order extending it. An indictment issued by a grand jury whose term is up and has not been validly extended is void, *United States v. Bolton*, 893 F.2d 894 (7th Cir.1990) (per curiam), so like other jurisdictional rules this is a technicality with teeth. The term of the Special October 1984 Grand Jury that indicted the defendants expired on April 1, 1986, and the defendants were not indicted till August, so it is critical whether the life of the grand jury was extended. No order extending it exists but in *United States v. Taylor*, 841 F.2d 1300, 1306 (7th Cir.1988), a case involving the same grand jury, we held that it was enough that Chief Judge McGarr, who had presided over the Special October 1984 Grand Jury, had made a determination to extend it for another six months. As evidence that he had made such a determination we cited a "*nunc pro tunc*" order that he had issued on March 3, 1987, after the grand jury's term had (even if extended) expired. When, shortly after *Taylor* came down, the defendants asked us for a writ of mandamus directing Judge Holderman to dismiss the indictment because the grand jury's term had expired, we denied the writ, stating that *Taylor* "controls this case." *In re Daniels*, No. 88-1750 (7th Cir. April 25, 1988) (unpublished).

The government argues that *In re Daniels* establishes the law of this case, thus providing another reason beside *stare decisis* why we should not reexamine *Taylor*. But we are not disposed to reexamine the holding of *Taylor* in any event, the holding being only that a formal order is not necessary to extend the life of a grand jury. Although the defendants in this case disagree with that holding, the main thrust of their argument is different.

It is that the *nunc pro tunc* order is not reliable evidence of Judge McGarr's determination to extend the grand jury.

When the order was issued, not only had the grand jury's term, even if it had been extended by six months, expired, but Judge McGarr was no longer chief judge and hence was no longer presiding over grand juries. On both accounts he had no authority to extend the life of the grand jury. A judge may correct a clerical error at any time, pursuant to Rule 36 of the criminal rules, a parallel provision to the better known civil rule 60(a) of the civil rules. But he may not rewrite history. *United States v. Janik*, 723 F.2d 537, 545 (7th Cir.1983); *King v. Ionization International, Inc.*, 825 F.2d 1180, 1188 (7th Cir.1987). The significance of Judge McGarr's *nunc pro tunc* "order" (not really on order) is evidentiary, as is apparent from its wording, which speaks of Judge McGarr's recollections and intentions during the grand jury's initial eighteen-month term. In *Taylor* we were given no reason to doubt the reliability of these recollections and intentions and treated the "order" as, in effect, an unrebutted affidavit. The present defendants have submitted evidence, which Judge Holderman may have brushed aside too quickly, that the order is not reliable. The order was drafted by government lawyers and given to Judge McGarr to sign without notice to the defendants or to their lawyers. It is signed but of course not attested.

Imagine that Judge McGarr had retired before March 1987 and it became necessary to determine whether he had extended the term of the grand jury during its initial eighteen-month term. The government could not have gone to Judge McGarr and asked him for an order; a retired judge (as distinct from a judge who, having reached retirement age, remains in service as a senior judge) has

no authority to issue orders. The government would have had to ask Judge McGarr for an affidavit and the defendants would have been entitled to contest the affidavit by suitable means which might have included questioning both the grand jurors and Judge McGarr under oath. What difference should it make that Judge McGarr had not yet retired (he has retired since, and returned to the practice of law) when the government lawyers came to see him? He was no longer presiding over grand juries and had no authority to issue orders concerning them; in any event the Special October 1984 Grand Jury had disbanded and its members had dispersed.

The issue of the adequacy of Judge McGarr's order *as evidence* was not clearly presented in *Taylor*. The defendants' subsequent petition for mandamus raised it clearly enough but the issue was not a suitable one for mandamus and our remark in denying the petition that *Taylor* "controls this case" was dictum. In both of those proceedings we assumed rather than determined the reliability of the *nunc pro tunc* order as evidence of Judge McGarr's recollections and intentions. What is more, in disposing of still another futile effort by the defendants to obtain a premature determination of the issue, the same panel that had denied the petition for mandamus later reassured the defendants that their challenge to the indictment would be considered on the merits when properly raised. *United States v. Daniels*, 848 F.2d 758, 760 (7th Cir.1988). There was no suggestion that the law of the case doctrine would prevent such consideration.

We did say in *Taylor* that we were examining Judge McGarr's order to determine whether "it contains evidence" that the judge had made the requisite determination to extend the grand jury's life, and that "this evidence [the order, plus the fact that the grand jury had

voted to extend itself] suffices to show that the [Special October] 1984 Grand Jury was properly extended for six months." 841 F.2d at 1308-09. But the word "evidence" was not used with its technical legal meaning. The ex parte character of the order and the fact that Judge McGarr was no longer chief judge when he signed it should have been evident but they were not discussed and their significance was not grasped. The order's adequacy as evidence was, in short, not confronted. Judicial assumptions concerning, judicial allusions to, and judicial discussions of issues that are not contested are not holdings. *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 119, 104 S.Ct. 900, 918, 79 L.Ed.2d 67 (1984); *Hagans v. Lavine*, 415 U.S. 528, 533 n. 5, 94 S.Ct. 1372, 1377 n. 5, 39 L.Ed.2d 577 (1974); *Zenith Radio Corp. v. United States*, 437 U.S. 443, 459-62, 98 S.Ct. 2441, 2449-51, 57 L.Ed.2d 337 (1978); *United States v. House*, 808 F.2d 508, 511 (7th Cir.1986); *Glidden v. Chromalloy American Corp.*, 808 F.2d 621, 625 (7th Cir.1986); *Zbaraz v. Hartigan*, 763 F.2d 1532, 1544-45 (7th Cir.1985). The holding of *Taylor* is simply that the absence of an order entered before the initial term of the grand jury had expired was not a fatal defect invalidating the indictment. That holding would not be impaired by a conclusion based on the different record and arguments in the present case that the evidentiary foundations for the finding that the grand jury was in fact extended are too wobbly to permit the matter to rest.

Taylor refers repeatedly to Judge McGarr's "determination," made during the life of the grand jury though memorialized afterward, to extend that life. Another name for "determination" is, it might seem, "order," making the failure to memorialize it in a writing the kind of clerical oversight that can be corrected (without notice) under

Rule 60(a) of the civil rules or, as here, Rule 36 of the criminal rules. Such a correction can be made, in the words of Rule 36, "by the court at any time." Judge McGarr was a judge of the district court when he made the correction, and the proper member of a court to correct an oversight is the judge who committed the oversight in the first place. Since Rule 36 empowers the judge to act on his own initiative, the fact that the oversight was drawn to his attention by an ex parte submission of one of the parties would not invalidate the corrective order.

Unfortunately there is no way in which Judge McGarr's "determination" to extend the life of the grand jury can be deemed an "order." Not only does *Taylor* deny the possibility of such a characterization, 841 F.2d at 1306, but an order is a public act, not an internal mental act. A judge does not make an order, formal or informal, written or oral, when he decides, without telling anybody, that he has determined that the grand jury has unfinished business. The failure to announce his determination may be an oversight but it is not an oversight in an order, judgment, or any other part of the record, and it therefore cannot be corrected under Rule 36.

It is a question of fact whether Judge McGarr was mistaken in his recollection of having made an uncommunicated determination that the life of the grand jury should be extended. For obvious reasons, disputes over judicial recollection are not customarily resolved by placing the judge on the witness stand. The issue has arisen in cases where a judge is asked to vacate a criminal defendant's sentence on the ground that the presentence report contains false information, and he denies the motion on the ground that he did not rely on the information in deciding what sentence to give. We have upheld these denials even

though the judge was not subjected to the fires of cross-examination. *Johnson v. United States*, 805 F.2d 1284, 1289 (7th Cir.1986); *Blake v. United States*, 841 F.2d 203, 207 n.3 (7th Cir.1988); *United States v. Montoya*, 891 F.2d 1273, 1280 (7th Cir.1989); see also *United States v. Baron*, 860 F.2d 911, 919-20 (9th Cir.1988); but see *United States v. Fernandez-Angulo*, 897 F.2d 1514 (9th Cir.1990) (en banc). We assume that our judges are not only honest but also not unduly suggestible, and therefore that Judge McGarr would not have signed an order stating that he recalled extending the grand jury unless he accurately recalled having done so. (Chief Judge Grady, who succeeded Judge McGarr as chief judge, recalled *not* having extended a grand jury that handed down an indictment after the expiration of its eighteen-month term, and the result was the dismissal of the indictment. *United States v. Clemenic*, 886 F.2d 332 (7th Cir.1989), published as an appendix to *United States v. Bolton*, *supra*, 893 F.2d at 896-901.) It was not a recollection about the remote past, compare *Krist v. Eli Lilly & Co.*, 897 F.2d 293 (7th Cir.1990), and it was consistent with the fact that the grand jury had voted to extend its term. There can be no serious doubt about what Chief Judge McGarr would have done had he been asked in timely fashion to issue an order extending the life of the grand jury. The "evidentiary hearing" conducted in this case to determine Judge McGarr's recollection was unsatisfactory, for the reasons we have indicated, but we do not think it was so defective that we should remand for a further hearing at which Judge McGarr would be placed under oath, examined, and cross-examined—with results entirely predictable.

Although we conclude that the indictment in this case was valid, we are greatly distressed at the amount of judicial time that has been consumed by this snafu, the

result of the failure of the United States Attorney for the Northern District of Illinois to keep track of his grand juries. We trust that steps will be taken to prevent a recurrence of such negligence.

Several issues raised by Daniels alone also merit discussion. First, he argues that he was coerced into pleading guilty by promises that he would get a lighter sentence and also that he would be let out of solitary confinement at the Metropolitan Correctional Center, where he was being held to prevent him from continuing to conduct his drug ring from jail. There is no evidence of the latter promise beyond the fact that, shortly after Daniels pleaded guilty, he was indeed let out of solitary confinement. This could have been a coincidence, and it did not require Judge Holderman to find, in the absence of any other evidence, that the plea had been coerced.

Regarding the promise of leniency in sentencing, Daniels stresses Judge Holderman's statements during the guilty-plea hearing that "I give substantial weight . . . if a defendant who is guilty is willing to admit that to himself and to other people around him and to me" and "substantial consideration to people who believe they are guilty [when they] admit it," and his interrupting the hearing to sentence a defendant in an unrelated case who had pleaded guilty. The judge told everyone in the courtroom (thus including Daniels) to pay close attention to that sentencing, then told the defendant in the unrelated case that he always takes a guilty plea into account in sentencing and proceeded to sentence him to probation. Daniels argues that by staging this little show of compensated contrition Judge Holderman led him to expect that if he pleaded guilty he would get off with a sentence a lot shorter than 55 years. The government replies that had Daniels not pleaded guilty, Judge Holderman might well have sen-

tenced him to life in prison without parole. The government points out that, with time off for good behavior, Daniels can expect to be released in the year 2024, when he will be "only" 73 years old. In fact his life will have been ruined.

A plea bargain is a contract. If the government, or the judge, breaks the contract, the defendant must be allowed to withdraw his plea. *Santobello v. New York*, 404 U.S. 257, 262, 92 S.Ct. 495, 498, 30 L.Ed.2d 427 (1971); *United States v. O'Brien*, 853 F.2d 522, 525-26 (7th Cir.1988); *United States v. Strawser*, 739 F.2d 1226, 1229 (7th Cir. 1984); *Brooks v. United States*, 708 F.2d 1280 (7th Cir. 1983). And no more than in ordinary contract law need a promise in a plea negotiation be express in order to bind. *United States v. O'Brien*, *supra*, 853 F.2d at 526; *United States v. Bowler*, 585 F.2d 851, 854 (7th Cir.1978). But the content of the promise is a question of fact, *United States v. Strawser*, *supra*, 739 F.2d at 1229; *United States v. Fields*, 766 F.2d 1161, 1168 (7th Cir.1985), and we cannot say that Judge Holderman made a clear error in determining that he had not broken any promise of leniency. Daniels could not expect Judge Holderman to give him probation if he pleaded guilty. The only promise reasonably to be inferred from the judge's statements and conduct was that Daniels would receive an undefined amount of consideration if he pleaded guilty—enough consideration to avoid a sentence of imprisonment for his natural life, for that was the maximum sentence, but beyond that he was throwing himself on the judge's mercy. If he stood trial, as was his right, almost certainly he would not only be convicted but also be sentenced to life imprisonment without possibility of parole, and it must have seemed preferable to him to gamble on Judge Holderman's generosity. That he was disappointed does not establish a breach of contract.

We are troubled that Judge Holderman should be the official deputed to determine whether Judge Holderman broke his promise to the defendant. It seems to make him a judge in his own cause. But that is not the view that our legal system takes of such cases. A defendant who wants to withdraw his guilty plea before sentencing must address his motion in the first instance to the judge who accepted the plea (unless the judge has died or retired or recused himself), for that is the judge in the case. After sentencing, if you want to withdraw your guilty plea you must return to the sentencing court, 28 U.S.C. § 2255, and as a practical matter that means the sentencing judge. These are just two illustrations, although highly pertinent ones, of the point that our legal system often empowers a judge to decide, subject only to deferential appellate review, whether a previous ruling by him was in error. The procedure is not a denial of due process. Even though most judges, like most anyone, are reluctant (if only unconsciously) to acknowledge their mistakes, judges are not interested parties in the sense of having a monetary interest in the outcome of their rulings or a familial or other close relationship with a party or a lawyer in the case. We do not allow trial judges to sit on appeals from their cases but we do allow them to reconsider their rulings. 28 U.S.C. § 47; *Russell v. Lane*, 890 F.2d 947 (7th Cir. 1989); *David v. Attorney General*, 699 F.2d 411, 416-17 (7th Cir.1983). A plea to withdraw a guilty plea is considered in this light. The fact that the specific determination Judge Holderman had to make was whether he had broken his promise is immaterial, for the situation would be the same if he were asked to reconsider an order denying a motion for an extension of time on the ground that he had promised the extension.

Even if there was no breach of an implied promise to Daniels he still can argue that since a promise of lenien-

cy can result in a *confession's* being adjudged coerced, *United States v. Rutledge*, 900 F.2d 1127, 1129-1130 (7th Cir.1990); *United States v. Guerrero*, 847 F.2d 1363, 1365 (9th Cir.1988); *Quartararo v. Mantello*, 715 F.Supp. 449, 460-61 (E.D.N.Y.), aff'd without opinion, 888 F.2d 126 (2d Cir.1989), the same should be true with respect to a guilty plea, which is like a confession but even more conclusive. However, the analogy between a confession and a guilty plea—expressly rejected in *Brady v. United States*, 397 U.S. 742, 754, 90 S.Ct.1463, 1472, 25 L.Ed.2d 747 (1970)—is not perfect. If it were, there could be no plea bargaining, an essential element of which is the prosecutor's implied promise of leniency if the defendant forgoes his right to put the government to the expense and uncertainty of a trial. The elaborate hearing that is required before a judge can accept a guilty plea is designed to assure that the defendant is not induced by the promise of leniency to plead guilty to a crime he did not commit. But that the promise is the inducement is taken for granted; and although this is distressing to the opponents of plea bargaining, their views have yet to move the Supreme Court or Congress. Perhaps if the promise of leniency were so extravagant that it would induce even an innocent person to plead guilty, the plea would be invalid, although *Brady* can be read to suggest not. 397 U.S. at 758, 90 S.Ct. at 1474. Suppose, fantastically, that a person accused of first-degree murder, but innocent, were offered a plea of guilty to a traffic offense. The risk of conviction of murder, even if slight, would when multiplied by the cost to the defendant of being punished if he were convicted induce many a rational but innocent defendant to plead guilty to a traffic offense; a plea in these circumstances, although entirely voluntary, would be unreliable. Even then it could be argued that the defendant would be protected by the trial judge's obligation to inquire whether

the plea has a factual basis, and that any limitation on freedom of contract deserves defendants' interests. We need not pursue the issue further, however the considerations we have listed may balance out, we were speaking in our hypothetical case of an *extravagant* promise, and there was no such promise in our actual case unless Judge Holderman was implicitly promising Daniels probation if he pleaded guilty. Not even Daniels argues that.

The last question we discuss is whether Judge Holderman should have granted the defendants' motion to suppress evidence obtained by the FBI's recording of Daniels' telephone calls from jail on the ground that it violated the federal wiretapping law. 18 U.S.C. §§ 2510 *et seq.* As in *United States v. Feekes*, 879 F.2d 1562, 1565-66 (7th Cir.1989), we need not decide whether this is a case of consent by one of the parties to the phone conversation (namely Daniels) and is therefore within the exception in 18 U.S.C. § 2511(2)(c). The government does not advance its cause with us by arguing that Daniels' consent can be inferred from a provision in the Code of Federal Regulations which says that inmates' phone calls may be monitored. That is the kind of argument that makes lawyers figures of fun to the lay community, and although a respected sister court has accepted it, *United States v. Amen*, 831 F.2d 373, 379 (2d Cir.1987), we place no weight on it. In addition, however, Daniels not only signed a form which states "I understand that telephone calls I make from institution telephones may be monitored and recorded," but also stated in one of the monitored and recorded conversations: "don't think for one minute this conversation ain't being recorded." He thought that by the use of a simple code he could prevent the eavesdroppers from understanding what he was doing. He thought wrong. This may make his case seem identical to that of a per-

son who consents to the search of his house, erroneously believing that the police will fail to do a thorough job and uncover the contraband that he has concealed in it. No law shields evidence thus obtained from use in a criminal prosecution. But knowledge and consent are not synonyms. Taking a risk is not the same thing as consenting to the consequences if the risk materializes. A person who walks by himself late at night in a dangerous neighborhood takes a risk of being robbed; he does not consent to being robbed. We would be surprised at an argument that if illegal wiretapping were widespread anyone who used a phone would have consented to its being tapped and would therefore be debarred from complaining of the illegality.

However, here as in *Feekes* the government has a good alternative ground for the admissibility of the wiretap evidence. Section 2510(5)(a)(ii) of the Criminal Code allows wiretapping "by an investigative or law enforcement officer in the ordinary course of his duties." This describes what the FBI agents were doing when listening to Daniels conduct an illegal enterprise. See also *United States v. Sababu*, 891 F.2d 1308, 1328-29 (7th Cir.1989); *United States v. Paul*, 614 F.2d 115, 117 (6th Cir.1980).

AFFIRMED.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

June 11, 1990

Before

Hon. Walter J. Cummings, Circuit Judge
Hon. Richard A. Posner, Circuit Judge
Hon. Daniel A. Manion, Circuit Judge

Nos. 89-2014, 89-2015, 89-2025, 89-3176	)	Appeals from the United States District Court for the Northern District of Illinois, Eastern Division. No. 85 CR 232 James F. Holderman, *Judge.*
UNITED STATES OF AMERICA, Plaintiff-Appellee,	)	
v.	)	
ROOSEVELT DANIELS, *et al.*, Defendants-Appellants.	)	

ORDER

On May 24, 1990, defendants-appellants filed a petition for rehearing with suggestion for rehearing en banc. All of the judges on the original panel have voted to deny the petition, and none of the active judges has requested a vote on the suggestion for rehearing en banc. The petition is therefore DENIED.

[1]* IN THE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA	)	
	)	85 CR 232
v.	)	
	)	Chicago, Illinois
ROOSEVELT DANIELS, et al.,	)	February 27, 1987
	)	11:19 a.m.
Defendants.	)	

TRANSCRIPT OF PROCEEDINGS
BEFORE THE
HONORABLE JAMES F. HOLDERMAN

APPEARANCES:

For the Government:	HOWARD M. PEARL Assistant U.S. Attorney
For defendant Roosevelt Daniels:	MICHAEL H. KING
For defendant Sandra Campbell:	DOUGLAS P. ROLLER

[2] THE CLERK: 85 CR 232, United States v. Roosevelt Daniels. For emergency motion.

MR. ROLLER: Good morning, your Honor. Douglas Roller on behalf of the defendant Sandra Campbell.

MR. KING: Good morning, your Honor. Michael King on behalf of Roosevelt Daniels.

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* Numbers in brackets refer to the Court Reporter's original pagination of the Transcript of Proceedings.

MR. PEARL: Good morning, your Honor. Howard Pearl on behalf of the United States.

MR. ROLLER: I know your Honor is pressed for time. We have filed a written motion just now, emergency motion. I think it speaks for itself. Our position is quite simple.

The indictment in the present case, we believe, is invalid. The defendants are being held pursuant to an invalid indictment. They should be released.

MR. KING: Your Honor, I talked to Michael Cohen, who represents Lawrence Lee. Mr. Cohen could not be here this morning, but he has authorized me to inform you that he joins the motion on behalf of Mr. Lee.

THE COURT: All right.

Mr. Pearl?

MR. PEARL: Judge, each of these defendants in this case has pled guilty to charges returned by a lawfully constituted Grand Jury. I don't see the problem. I don't know where the evidence is that this superseding indictment was necessarily invalid.

[3] As we informed the Court yesterday and defense counsel, there is an extension order that we believe to have—we believe the Grand Jury was properly extended. We believe that the ministerial or clerical mistake is just that. We are in the process of finding out how it happened and trying to rectify it.

But, as I said, this Court clearly had jurisdiction in this case. These defendants have pled guilty to offenses charged by a lawfully—indisputably lawfully constituted Grand Jury, and, of course, a plea of guilty waives any defects in the institution of prosecution. I don't see how they get out.

MR. ROLLER: 18 U.S.C. 3331 is quite clear as to the process by which a grand jury can be extended. It requires an order of the court for each six-month extension.

The Special October 1984 Grand Jury was past its 18-month original session. There has to be a constituted grand—properly constituted grand jury, and for that grand jury to have returned a superseding indictment, an order by the Chief Judge extending them for the additional increments of six months must have been entered.

I don't think that there is any dispute that there is no such order in the Clerk's files in connection with extending that grand jury, and I do not believe, your Honor, that defendants are being held in light of an [4] indictment which was returned by a clearly invalid grand jury.

If there's no order extending, it was like bringing 26 people off the street and voting to indict.

THE COURT: Well, let me—it wasn't like bringing 26 people off the street—

MR. ROLLER: Well, I overstated. I apologize.

THE COURT: These people had previously been sworn to be grand jurors, and had served as grand jurors. But is there a dispute as to whether there's a valid order, Mr. Pearl?

MR. PEARL: There is. As I said, your Honor—

THE COURT: Mr. Roller said it wasn't disputed.

MR. PEARL: Right.

THE COURT: Is it disputed?

MR. PEARL: I think that's incorrect. As we informed the Court in writing, it's our belief that the grand jury was, in fact, extended. We are confident of that. And we are in the process of trying to document it.

THE COURT: Okay.

MR. PEARL: All we informed the Court of was that the actual—there is no actual minute order at this time that can be found in the Clerk's office.

THE COURT: All right, I am applying the—

MR. KING: Your Honor, may I—

[5] THE COURT: Yes, Mr. King? Do you have something to say?

MR. KING: Yes, sir. I know that your Honor is under time pressure, but this is a matter of great substance.

THE COURT: I will take as much time as you need, Mr. King—

MR. KING: I appreciate that.

THE COURT: —for you to address me, all right? This is in on an emergency motion. I allowed time for you to present it.

MR. KING: I appreciate that.

THE COURT: What would you like to say that Mr. Roller hasn't said?

MR. KING: Judge Shadur, in a case pending before him in which the Government was a party, ruled—

THE COURT: I'm familiar with that. Judge Shadur has kept all the judges apprised as to his positions, as well as sent us additional letters citing authority for us.

MR. KING: Without rearguing Judge Shadur's position, and I don't intend to do that to you, I believe that under appropriate rules of authority, the Government is collaterally estopped now from taking the position that the indictments returned by that grand jury are valid. Judge Shadur has ruled as a matter of law with respect to the consequences of an improper extension of the grand jury. [6] Therefore, I believe the Government, as a party to that proceeding, is collaterally estopped, and I believe that this Court is now bound by the proposition that orders and indictments returned by a grand jury which is not clearly, on its face, a validly constituted and extended grand jury are invalid.

If the indictments are invalid, your Honor, there is no basis to hold the defendants in custody.

THE COURT: Mr. Pearl, are you appealing that decision?

MR. PEARL: I can't say, but I can say two things, one, that—

THE COURT: You have got 30 days, of course, to file—

MR. PEARL: Yes, and I'm sure Mr. King, if he checked, would realize that the grand jury in the case before Judge Shadur was not the same grand jury that's involved in this case, and, second, of course, Judge Shadur doesn't bind the rest of the court.

MR. ROLLER: But the issue is the same—

THE COURT: I understand the issue is the same—

MR. PEARL: No. And there were no pleas of guilty in that case.

THE COURT: —and I am following Judge Shadur. Judge Shadur has been very conscientious in keeping all the [7] other judges apprised as to precisely what he is doing. He has provided us with materials, as he does in a number of issues that come up. Judge Shadur is of the mind, and I agree with him on this position, that we should keep one another apprised as to what our decisons are if they seem to have something that would—another judge may have to rule on. And so I'm aware of it.

But I will tell you right now there is nothing before me that would indicate that this grand jury that returned the indictment that's pending now was invalid.

MR. KING: Judge—

THE COURT: There is nothing before me.

MR. KING: The Government has told you that they are unable to demonstrate to you, standing here—

THE COURT: Mr. King—

MR. KING: —that there is jurisdictional authority for this Court.

THE COURT: Okay, thank you, Mr. King. I was aware of that, and I took that into account. The Government has told me that. But I have nothing before me to indi-

cate that this Grand Jury was invalidly constituted at the time that it returned this indictment.

MR. KING: You have the Government admission that—

THE COURT: Mr. King,—

MR. KING: You have the—

[8] THE COURT: Is there something else, some other piece of evidence that you would like to present to me?

MR. KING: Judge, yes, I want to make as complete a record as I think is appropriate.

THE COURT: Please do.

MR. KING: Thank you.

The Government has said to you that they are unable to demonstrate to you that there was a valid extension order with respect to this Grand Jury. In the absence of that, the Court is without jurisdiction, and the indictment before, which—which is pending before you and on which the defendants are being held is a nullity, it's without legal consequence.

The guilty pleas were not completed because sentences had not been imposed. It was simply an interim step in the proceedings. I believe that those pleas are all invalid. I don't address the question of what arises with respect to any defendant who has already been sentenced, whose case arguably is over with, but with respect to Mr. Daniels, it is clear that the proceedings have not been concluded, that all of his rights are preserved at this point, and that the pleas are a nullity.

It is also clear that the only authority by which Mr. Daniels is being held in federal custody at this moment is this indictment, and the Government is unable to [9] demonstrate to you affirmatively that they can prove to you and carry their burden of saying that there is a valid indictment pending before you, returned by a validly constituted and extended grand jury.

In the absence of that, your Honor, with all due respect, I believe that there is an invalid proceeding, and that there is no lawful authority to hold the defendants in custody. The superseding indictment which is before you is a nullity.

THE COURT: All right, anything else?

MR. KING: No, sir.

THE COURT: All right, the emergency motion for writ of habeas corpus is denied.

MR. PEARL: Thank you, your Honor.

MR. KING: Thank you, your Honor.

MR. ROLLER: Thank you.

[Certificate of the Official Court Reporter omitted in printing]

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

March 5, 1987.

Before

Hon. WILLIAM J. BAUER, Chief Judge
Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. RICHARD D. CUDAHY, Circuit Judge

ROOSEVELT DANIELS and SANDRA CAMPBELL, Petitioners	)	Petition For Writ of Mandamus
No. 87-1322 vs.	)	
HONORABLE JAMES F. HOLDERMAN, U.S. District Court Judge for the Northern District of Illinois, Eastern Division, Respondent	)	

This matter comes before the court for its consideration of the following documents:

1. "PETITION FOR WRIT OF MANDAMUS" filed herein on March 4 [sic], 1987, by counsel for the petitioners.
2. "GOVERNMENT'S RESPONSE TO PETITIONERS' PETITION FOR WRIT OF MANDAMUS" filed herein on March 4, 1987, by counsel for the respondent.

The district court has not yet had an opportunity to evaluate all of the evidence with regard to petitioners' claim. Judge Holderman will be hearing evidence within

the week that will allow him to do so. Further, because the indictment in question was preceded by two valid indictments, the district court's determination of this issue will not affect the petitioners' custody.

Accordingly, the petition for writ of mandamus is DENIED as premature.

[1]* IN THE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA	)	
	)	85 CR 232
v.	)	
	)	Chicago, Illinois
ROOSEVELT DANIELS, et al.,	)	March 12, 1987
	)	1:34 p.m.
Defendants.	)	

TRANSCRIPT OF PROCEEDINGS
BEFORE THE
HONORABLE JAMES F. HOLDERMAN

APPEARANCES:

For the Government:	HOWARD M. PEARL and MARK D. POLLACK, Assistant U.S. Attorneys
For defendant Roosevelt Daniels:	MICHAEL H. KING and JON K. STROMSTA
For defendant Edward Fitzgerald:	THOMAS ANTHONY DURKIN and JANIS D. ROBERTS
For defendant Sandra Campbell:	DOUGLAS P. ROLLER
For defendant Kenneth Johnson:	JAMES A. GRAHAM
For defendant Troy Campbell:	MARIANNE JACKSON
For defendant Lawrence Lee:	MICHAEL B. COHEN

* Numbers in brackets refer to the Court Reporter's original pagination of the Transcript of Proceedings.

[4] * * * * *

MR. PEARL: We are ready to proceed.

MR. GRAHAM: Judge, I think that we are going to have to have Mr. Johnson in and apprise him of the circumstances and talk to him exactly as to what he is going to want to do at this point.

THE COURT: What circumstances are you referring to?

MR. GRAHAM: Well, it was—is there something resolved as to the grand jury aspects, Judge?

THE COURT: Well, let's move to the grand jury aspects.

I have received the Government's position with regard to the grand jury. I did not get a chance to review anything from the defense. Was there anything filed?

MR. KING: No, Judge. I indicated to you last week that we would try—if we got the Government papers on Monday, we would try to file a written response for today. I got the Government papers—

THE COURT: You told me you would file it [5] yesterday.

MR. KING: Well, in any event, I got the Government—

THE COURT: Right, but let's keep it straight.

MR. KING: I—

THE COURT: Have you filed anything?

MR. KING: I have not filed anything.

THE COURT: All right. I have reviewed the Government's materials. The defense has not filed anything in connection with this matter.

When, Mr. King, if you haven't filed anything, when do you think you are going to put something on file?

MR. KING: Judge, the thing that the Government filed creates several issues that require a substantial amount of research. What I would like to do—

THE COURT: The "thing"?

MR. KING: Marianne Jackson is here now.

THE COURT: The "thing" that the Government filed?

MR. KING: The Government response—

THE COURT: The "thing" that the Government filed was an order by the former Chief Judge of this District.

MR. KING: Yes, sir. That's the document to which I make reference.

THE COURT: Yes, Chief Judge McGarr, former Chief Judge McGarr.

[6] MR. KING: Former Chief Judge McGarr, now Senior Judge McGarr.

THE COURT: Right.

MR. KING: We would like 10 days to file motions before you that are responsive to the issues that we think are now framed.

THE COURT: That request will be denied. You told me you would get a response in by yesterday. Now you want 10 additional days from today?

MR. KING: Judge, I think that a fair statement is that we have an issue of substantial importance and complexity, both as to the procedural matters before you, how best to frame the issues, and how to let them be resolved in an expeditious way.

THE COURT: Mr. King, wait a second. I read that material from the former Chief Judge, and, as far as I could tell from that material, the grand jury had—and I don't have it here in front of me, it's back in the file—the grand jury had made its determination to extend, and he, in fact, had ordered an extension, and there was, as had been indicated to me before, no minute order or no order in the court's file.

Now, having been on the District Court bench for a while, I have learned that on occasion orders do get misplaced, and my understanding of the statement that was [7] made by Judge McGarr, it was either the order, the written order, was misplaced, which had previously been

entered, or that no written order had been entered, but he entered one nunc pro tunc.

Isn't that what was said?

MR. KING: I think that Judge—

THE COURT: —by the former Chief Judge?

MR. KING: Senior Judge McGarr's order speaks for itself. I believe that, as a matter of law—

THE COURT: Well, do you dispute my interpretation of it? The order speaks for itself.

MR. KING: Judge, I think Judge McGarr's order is improper on several grounds. I believe that it is not a matter that can be cured by a nunc pro tunc order. I believe that there are cases that stand for that proposition. I believe a fair reading of Judge McGarr's—

THE COURT: Well, then, why didn't you present something to me yesterday, like you said you would?

MR. KING: Judge, what I anticipated the Government filing was a factual statement. I did not believe—I didn't understand that the Government would file what is apparently a combination affidavit/order from Judge McGarr in which Judge McGarr makes statements about his own recollection, then passes on those statements, and then enters an order based on his reading of his own [8] recollection, combining a function that I believe to be improper. I think that the issues raised by Judge McGarr's order are of very serious concern and need substantial research.

I think for several reasons Judge McGarr's order is a nullity and is not binding on this Court. I believe it's—

THE COURT: Wait. You thought Judge Shadur's order on another grand jury was not only not a nullity, but in fact was binding on this Court—

MR. KING: Judge, I don't believe—

THE COURT: —and now we have got Judge McGarr's order, which sets forth the circumstances of what occurred, and now you are saying that's a nullity?

MR. KING: Judge, I believe that what is clear from Judge McGarr's order is that there is very great probability that no order was entered at the time it was required to be entered.

THE COURT: That's not what it says here, though. That's not what Judge McGarr's order says.

MR. KING: Judge, I'd like to file a written response that makes our point—

THE COURT: Well, were you there?

MR. KING: Pardon?

THE COURT: Were you there?

[9] MR. KING: I absolutely was not there. I had no notice of it.

THE COURT: Judge McGarr was.

MR. KING: Where?

THE COURT: In his courtroom at the time that the events of which he speaks took place

MR. KING: Judge, I would like to address that and the matters raised by Judge McGarr's order. I would like to do it in written form. I will do it as quickly as I can. Hopefully, it will be done in a way that you won't have multiple filings. But I would like to do it in written form. I think that—

THE COURT: Why couldn't you have done it by yesterday, like you said you would?

MR. KING: I did not anticipate what we would get was a nunc pro tunc order from a judge which combined capacities and purported to rule on the motions before you. I think that those raise substantial questions. I assure you I am not doing it for purposes of delay. I think that the matters raised by Judge McGarr's order are of very great significance.

THE COURT: Well, I had intended to rule on this matter today, and when I had not seen anything from the defense filed as the defense had said—the reason we set

up this status report for today was so that you could [10] file yesterday.

MR. KING: Yes, sir. I told you I was unavailable yesterday.

THE COURT: Well, that was the other reason, too, why we set it up. I could have set it up tomorrow.

MR. KING: No, you set it up for my convenience today, and I appreciate that, Judge.

THE COURT: But I guess the reason that I said that you would file—or you said you would file something yesterday was so we could have this status report today, because you were available today.

MR. KING: Yes, sir.

THE COURT: Now, I was going to rule on this matter. When I did not see in my files in my chambers that the defense had responded, I wanted to make sure that the defense had in fact not responded, just to make sure that if the defense had responded, it wasn't somehow misplaced in my chambers.

MR. KING: No, I understand, Judge.

THE COURT: Things happen like that, just like perhaps the minute order with regard to extending the grand jury.

Well, file something tomorrow. I'll set the matter over for status on Monday.

MR. KING: Judge, I will not be prepared to file [11] the kind of document that is appropriate.

THE COURT: What are you going to file?

MR. KING: I'm going to file a motion to dismiss, I'm going to file a legal memorandum in support of it—

THE COURT: Are you going to file anything to rebut the factual statements of Judge McGarr?

MR. KING: Judge, I am unable to rebut the factual statements of Judge McGarr without having appropriate discovery.

THE COURT: You mean you now want to take Judge McGarr's deposition?

MR. KING: Judge, there are a lot of questions that are raised by Judge McGarr's order that I would like to address in writing to you.

THE COURT: You mean you don't think that Judge McGarr is telling the truth?

MR. KING: I would like to respond to the matters raised by Judge McGarr's order in an appropriate way.

THE COURT: I'd like you to answer that question.

MR. KING: Do I think Judge McGarr is lying? No. How can I say that?

THE COURT: All right, then he's not.

MR. KING: I have no basis to say that.

THE COURT: Then he's telling the truth. You have no basis to dispute the factual statements that are made in [12] here.

MR. KING: Judge McGarr has filed an order that deals with his recollection, apparently, with other factual matters that are not a product of his own recollection.

THE COURT: Every time—

MR. KING: He then purports to evaluate those and rule on them as a matter of law. He issued a nunc pro tunc order. What is completely clear from Judge McGarr's order is that there was no order entered at the time that anybody can produce to you that extended the grand jury.

THE COURT: Well, there was no written order.

MR. KING: What Judge McGarr says in his order is, "I either intended to or I may have." He doesn't give you a date, he doesn't provide you with a transcript of the proceedings, he provides you with nothing but his conclusion. He provides you then with a ruling on his conclusion.

THE COURT: What he states in paragraph 10—

MR. KING: He has combined capacities.

THE COURT: What he states in paragraph 10—as you stated earlier, the order speaks for itself—paragraph 10 says:

> "It now appears that through inadvertence or mistake a written extension order was not presented to or executed by the Court or that such an order was executed and has since been lost."

[13] MR. KING: Right.

THE COURT: That's what he says.

MR. KING: And on two of those three possibilities, the indictments are invalid on their face, because I don't believe that if either one or two occurred and not three that that can be cured by a nunc pro tunc order.

THE COURT: Well, you know, the statute doesn't say anything about written order.

MR. KING: Judge, I would like to address these questions in writing to you in an appropriate form.

THE COURT: Well, I wanted you to—

MR. KING: I will do that as quickly as I can. I am unable to stand here today and give you the legal authority for the propositions that I think are reasonably straight forward as a matter of law that will prove to you, I believe, that this indictment is invalid, that the return by the grand jury was improper, and that this Court is without jurisdiction with respect to Roosevelt Daniels on the indictment pending before you.

MR. DURKIN: Judge—

THE COURT: Well, the Government filed—let me just—the Government filed on Monday. Can you get something in by Monday, the 16th? Then you would have had a week. You have actually been aware of this issue for some time, since you filed that motion for release of your client back [14] in February.

MR. KING: Judge McGarr's nunc pro tunc order—

THE COURT: Yes?

MR. KING: —is a significant event in terms of the motion. Judge McGarr's order needs to be addressed, it needs to be addressed in an appropriate—

THE COURT: Well, Mr. King, I just asked you can you do it by Monday?

MR. KING: I don't believe I can, Judge.

THE COURT: Can you do it by Tuesday?

MR. KING: Judge, I'm going to be out of town Friday, I'm going to be out of town—

THE COURT: What are you going to be doing out of town?

MR. KING: I have previous commitments.

THE COURT: You know, Mr. Daniels has another lawyer standing here, he has other lawyers back in other law firms. It is crucial that, since you have other commitments on other cases for other clients out of town, that some other lawyer for Mr. Daniels, since he has a number of lawyers in this matter, can't prepare something and get it filed on Monday?

MR. KING: Judge, I assure you, things are being worked on as we stand here.

THE COURT: Fine. Can you get them on file by [15] Monday?

MR. KING: I can only give you my best effort. I can't commit to something that I don't know I can deliver on.

THE COURT: Well, you actually had committed to yesterday, but—

MR. DURKIN: Judge, could I—

THE COURT: Sure.

MR. DURKIN: —add this for whatever it's worth—

THE COURT: —since we are not making any headway here.

MR. DURKIN: —on scheduling?

Since I didn't join in Mr. King's motion—or the writ of—the petition—

THE COURT: Well, your guy already was out.

MR. KING: He had won that one.

MR. DURKIN: He had his own—

THE COURT: You were in a different posture than he was.

MR. DURKIN: But seeing as though I didn't need a writ at the time, I had intended to file a motion to dismiss that would substantially cover the same issue. I believe, and I don't want to belabor it now, but I think there is some case law to the proposition that Judge McGarr's order cannot nunc pro tunc the extension of the grand jury, [16] and that there is a jurisdictional question of whether or not an order was entered. I don't want to argue it now or belabor it, but I did intend to file a motion in the nature of a motion to dismiss and to withdraw the guilty plea based on the Macklin case that I believe is referred to in Mr. King's petition. I think there is—

THE COURT: Wait. Mr. King's petition? You mean the one that went to the Seventh Circuit and came back?

MR. DURKIN: I thought it was filed before you, but maybe it's the one up in the Seventh Circuit. There is a case called United States v. Macklin—it's a Second Circuit case—that I think speaks of the jurisdictional issue.

The case the Government cites in their response to Mr. King's petition is McKay—or Wax v. Motley, and I—

THE COURT: Well, let me just say that on that petition, I interpreted the Seventh Circuit's order to basically moot that petition. The Seventh Circuit in its opinion stated that the defendants would not be released since the two other indictments still remain—

MR. DURKIN: I think that's right.

THE COURT: —even if this indictment that's pending is invalid.

MR. DURKIN: No, I think that's right.

[17] THE COURT: So that really moots that petition.

MR. DURKIN: No, I know—

THE COURT: That's not viable anymore. That's been ruled on by the Seventh Circuit.

MR. DURKIN: I'm only suggesting that on Fitzgerald's behalf, I do intend to file as quickly as I can a pleading based upon Macklin in the nature of a motion to dismiss and to withdraw the plea.

THE COURT: Well, can you get it on file by Monday?

MR. DURKIN: I will do whatever the Court sees fit. I think it's a significant enough issue that I would like to have more time, but I can get it done by Monday if the Court—I don't want—all I'm saying, Judge, is I don't want to duplicate the effort, and I believe I can convince you that we are entitled to some type of evidentiary hearing, and that Judge McGarr's order can't nunc pro tunc the jurisdiction of the grand jury.

THE COURT: Yes, but if Judge McGarr—judges sign orders every day. If it was up to the Judge's recollection as to whether an order was signed and thereafter lost or whether no order was presented and therefore not executed, when, in fact, the grand jury had requested an extension, and the Judge granted the extension, we would be in a difficult posture.

The way I see Judge McGarr's order is that [18] he recalls exactly what he said, which is that, through inadvertence or mistake, a written extension order was not presented to or executed by the Court, or that such an order was executed and has since been lost.

Now, it seems to me that if an order was, in fact, executed, and has since been lost, that, under that circumstance, the grand jury is not invalid, and, in fact, even

if no written extension order was presented, I would have to review the case law to see what judicial gloss the judges have put on the extension statute, but, from my reading of the extension statute, there really is no requirement that a written order be entered, and, in fact—

MR. DURKIN: That may be the case.

THE COURT: —if the judge of the district court fails to extend the grand jury when the grand jury wants to extend, the grand jury can petition the chief judge of the circuit, and there's no indication that the chief judge of the circuit has to enter a written order.

MR. DURKIN: Maybe it's because I haven't been in this, but is there any reason why there just isn't a—why we have to—is there a transcript? Don't these things occur in open court?

THE COURT: I only can deal with what's in front of me. You are asking me if there's a transcript. I wasn't there.

[19] MR. ROLLER: That's the reason, I think, Judge—

MR. DURKIN: No, I wasn't, either, but I mean the only thing—I mean I don't want to belabor it now. I think you may be correct, I may be correct. I don't know. I simply wanted to apprise you that that's what I would be doing.

If it will make your work easier, instead of having to rule twice, I can have something on file by Monday or Tuesday, if that's fitting.

THE COURT: All right. Well, let's go back to Mr. King, then.

Mr. King, with all your obligations out of town, when do you think you can get something on file?

MR. KING: Judge, I asked for 10 days from today. I—

THE COURT: Why do you need that much time? I mean that really is a long time.

MR. KING: How about—

THE COURT: This case has been pending a long time.

MR. KING: Judge, it has.

THE COURT: I want to get it to a resolution one way or the other, and I expect the lawyers to help me out in that. I, frankly—the fact that you said—you stood right here and said you would file something by yesterday, I can't understand why you just let it go by, didn't come [20] in on a motion to apprise me and ask for an extension of time if that's in fact, what you wanted. You know, I hear criminal motions every day at 1:30.

MR. COHEN: Judge, can I be heard for a second?

THE COURT: Certainly.

MR. COHEN: I think this case is obviously going to a higher court either way.

THE COURT: It is.

MR. COHEN: Right, and I think that it ought to be put in the proper posture to arrive there.

I have discussed this briefly with Mr. King. If the Seventh Circuit doesn't have the full total picture, then it's going to bounce up and back and up and back. I think they ought to get it—we ought to be given 10 days to present our joint position to you. I see a lot of problems with Judge McGarr's order.

THE COURT: But the full total picture, what do you envision that to be?

MR. COHEN: I think there's a lot lacking now. We are dealing with Judge McGarr's recollection. That might not be the best evidence of what happened, and we would like to ascertain if such evidence exists. I'm not talking about cross-examining Judge McGarr. There are other avenues that are open to various defendants which we have sat down and discussed for two hours already today. We are not laying [21] down doing nothing on this.

I think it's a very, very—a substantial issue that has been raised by Judge McGarr's order and the grand jury proceedings.

MR. KING: Judge, if I could have until the close of business Thursday, we'll get the papers on file to you. Frankly, I want these papers to be the best papers we can file, and I want to take a close look at them, and I want not to have to replow ground already plowed. I'd like to have whatever motions—

THE COURT: What ground has been plowed on this issue?

MR. KING: Pardon?

THE COURT: What ground has been plowed on this issue?

MR. KING: Well, I think the question of custody has been dealt with by the Court of Appeals—

THE COURT: Right.

MR. KING: —and so the procedural question of habeas corpus has now got to be examined as to whether that's the proper motion that ought to be before you, whether there ought—the Government has taken the position that guilty pleas waive jurisdictional defects, and we don't agree with that as a matter of law, but that needs to be addressed—

THE COURT: Wait, has the Government—the Government hasn't said that here, have they?

[22] MR. KING: They said that in the Court of Appeals, Judge.

THE COURT: Yes, but, you see, that was on a—

MR. KING: As a matter of fact, they said it before you.

THE COURT: —that was on a writ of habeas corpus which the Court of Appeals—you took on a mandamus to the Seventh Circuit, and the Court of Appeals denied the mandamus, and—

MR. KING: —as being premature, yes, sir.

THE COURT: —on grounds of being premature, but also added in the order—

MR. KING: Yes, sir.

THE COURT: —something which I consider to be dispositive of the issue.

MR. KING: Judge, I am absolutely as sensitive as you are to the language in the Court of Appeals' order—

THE COURT: Right.

MR. KING: —and that's why I want the proper motions before you, so that you can rule, and the record will be clear.

THE COURT: Well, do you agree that that was dispositive of the issue? I mean, the Court of Appeals didn't say—

MR. KING: It's a matter of great substance to [23] me, I'll say that.

THE COURT: Pardon me?

MR. KING: It's a matter of great substance to me that they said that.

THE COURT: The Court of Appeals didn't say because these defendants have pleaded guilty, they waive the jurisdictional—

MR. KING: No, they did not.

THE COURT: The Court of Appeals didn't say that.

MR. KING: No, they did not.

THE COURT: So whatever the Court of Appeals said in response to your petition for mandamus, that has no bearing on anything that's pending before me.

MR. KING: Well, as a matter of fact, my recollection is—I may be wrong—my recollection is Mr. Pearl said that to you also when we were before you on that Friday.

THE COURT: But that has no bearing on me on this point now. That was on something that has already been decided—

MR. KING: Judge, the issue is—

THE COURT: —by the Court of Appeals.

MR. KING: The issue, the broad issue, is, is there a valid indictment before you. We want that issue formed and shaped in a way that's appropriate, clean, and you can rule on it, the Government can respond, and whatever will [24] happen will happen with respect to that.

I don't want part of a habeas corpus that may be without foundation because of the custody indication by the Appellate Court.

Frankly, I think this is a time when—

THE COURT: It was more than an indication. It was a ruling.

MR. KING: Well, no, what the ruling was is that it was denied as premature. The ruling wasn't that it's denied as being—

THE COURT: Well, okay, it was instructive.

MR. KING: I accept that.

THE COURT: And I must follow the instructions of the Seventh Circuit. That's my job.

MR. KING: I accept that, Judge. I think it's appropriate that the issues be framed properly before you, and this is a time—you are absolutely correct, this case has gone on a very long time—this is a time, I believe, a point where an extra day or two will save a lot of time and a lot of confusion and will save a lot of unnecessary time later on if clean narrow issues are presented to you and you can rule on them in whatever way the Court deems appropriate.

THE COURT: If I firmly believed that giving you more time would make the issues narrower or cleaner, I would [25] do it.

MS. ROBERTS: Judge, on behalf of Mr. Fitzgerald—on behalf of Mr. Fitzgerald, I believe that giving us until

some time next week, all defendants, at least Mr. Fitzgerald, time to properly put this issue before the Court, will make it cleaner, and therefore make the record clearer for the Seventh Circuit, which is obviously going to have to decide this question.

My reading, and I—

THE COURT: All right, I'm going to give the defendants all the time they want. You want 10 days. Ten days runs off on Sunday, March 22nd. You have until March 23rd to file any motions, any memoranda in support thereof, in connection with what we will broadly call—or what you have broadly called the validity of the indictment.

MR. KING: Thanks, Judge.

THE COURT: You are welcome.

* * * * *

[Certificate of the Official Court Reporter omitted in printing]

[1]*

IN THE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA	)	
	)	85 CR 232
v.	)	
	)	Chicago, Illinois
ROOSEVELT DANIELS, et al.,	)	April 8, 1988
	)	1:30 p.m.
Defendant.	)	

TRANSCRIPT OF PROCEEDINGS
BEFORE THE
HONORABLE JAMES F. HOLDERMAN

APPEARANCES:

For the Government:	HOWARD M. PEARL and VICTORIA J. PETERS Assistant U.S. Attorneys
For defendant Roosevelt Daniels:	MICHAEL H. KING and ALLAN A. ACKERMAN
For defendant Edward Fitzgerald	JOHN ESPAR
For defendant Kenneth Johnson:	GLENN SEIDEN

* * * * *

* Numbers in brackets refer to the Court Reporter's original pagination of the Transcript of Proceedings.

[6] MR. ACKERMAN: There has been a unanimity of acknowledgment on that score, your Honor.

THE COURT: All right.

All right, with regard to the defendants' motion to dismiss the second superseding indictment and request for an evidentiary hearing, I believe that all the pertinent issues that need to be dealt with in connection with that motion have been dealt with by the Seventh Circuit in United States v. Taylor. That case dealt with a codefendant in this case.

The statements made by the Seventh Circuit with regard to the facts that were before it in connection with Mr. Taylor's case are precisely the facts that would be before me in connection with the determination as to the codefendants. I believe the grand jury was validly extended, and the indictment need not be dismissed on that basis. Consequently, that motion will be denied, and there's no need for an evidentiary hearing, since all the pertinent facts really are clear in the record.

All right, with regard to the defendants' motion to recuse me from dealing with the motions to withdraw the guilty pleas, it seems to me that that motion is, in fact, premature, because at this point I am certainly capable of dealing with the motion to withdraw the guilty pleas.

[10] * * * * *

MR. KING: Your Honor, on the—have you finished that matter, Judge?

THE COURT: Yes. Is there anything else we need to discuss today?

MR. KING: On the motion to dismiss the indictment, you talked about—in your ruling you mentioned the impact of the Taylor opinion on the factual determinations. There were some grounds that were asserted in that motion that really did not deal with Taylor that dealt with

effective assistance of counsel and the proceedings that had occurred with respect to the pending motions.

I just wanted to be clear that you were addressing those also in your ruling, so the record would be clear.

THE COURT: The entire motion to dismiss is denied.

MR. KING: Thank you.

MR. SEIDEN: Does that conclude the matter, Judge?

THE COURT: Call the next case.

* * * * *

[Certificate of the Official Court Reporter omitted in printing]

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

April 25, 1988.

Before

Hon. JOHN L. COFFEY, Circuit Judge
Hon. JOEL M. FLAUM, Circuit Judge
Hon. FRANK H. EASTERBROOK, Circuit Judge

No. 88-1750	)	
	)	
IN THE MATTER OF:	)	Petition for
	)	Writ of Mandamus.
ROOSEVELT DANIELS,	)	No. 85 CR 232
SANDRA CAMPBELL,	)	Judge
LAWRENCE LEE, EDWARD	)	James F. Holderman
FITZGERALD, and	)	
KENNETH JOHNSON,	)	
Petitioners.		

This matter comes before the court for its consideration of the "PETITION FOR WRIT OF MANDAMUS" filed herein on April 19, 1988, by counsel for the petitioners.

In *U.S. v. Taylor*, No. 87-1378, slip op. (7th Cir. February 17, 1988), this court made the legal determination that the special October 1984, grand jury was properly constituted when it turned in indictments beyond its initial 18 month term. That decision controls this case. Accordingly,

IT IS ORDERED that said motion is DENIED.

UNITED STATES of America,
Plaintiff-Appellee,

v.

Roosevelt DANIELS, et al.,
Defendants-Appellants.

No. 88-1767.

United States Court of Appeals,
Seventh Circuit.

Submitted May 16, 1988.

Decided May 31, 1988.

* * * * *

Before COFFEY, FLAUM and EASTERBROOK, Circuit Judges.

EASTERBROOK, Circuit Judge.

The five defendants in this case pleaded guilty to criminal charges filed against them but have not been sentenced. They have moved to withdraw their pleas on the ground that the grand jury that indicted them was serving beyond its term. After this court rejected a challenge to the tenure of the same grand jury, *United States v. Taylor*, 841 F.2d 1300 (7th Cir.1988), the district court declined to set aside the pleas. Contending that they want to make arguments not considered in *Taylor*, the defendants filed an interlocutory appeal.

The defendants have not been sentenced, so the appeal is premature. See *United States v. Hollywood Motor Car Co.*, 458 U.S. 263, 102 S.Ct. 3081, 73 L.Ed.2d 754 (1982) (claim that the indictment is based on prosecutorial vindictiveness may not be appealed before judgment); *United States v. MacDonald*, 435 U.S. 850, 98 S.Ct. 1547, 56 L.Ed.2d 18 (1978) (claim that the prosecution violates the

Speedy Trial Clause may not be appealed before judgment). The defendants assert that because of *United States v. Mechanik*, 475 U.S. 66, 106 S.Ct. 938, 89 L.Ed. 2d 50 (1986), they will be unable to present any objection to the term of the grand jury on appeal from a final judgment, so they must be able to raise it now. There are three flaws in that position.

First, *Mechanik* holds only that once a defendant's guilt has been established beyond a reasonable doubt, he may not raise objections to those portions of the grand jury's procedure that are designed to prevent the accusation of innocent persons. See *United States v. Fountain*, 840 F.2d 509, 514-15 (7th Cir.1988). The authoritative determination of guilt establishes that any defects in the procedure did not lead to the accusation of an innocent person and shows that obtaining a new indictment would be a charade. Some rules, such as the ban on racial discrimination in the selection of grand jurors, serve other or additional ends and may be invoked to contest an indictment even after conviction. *Vasquez v. Hillery*, 474 U.S. 254, 106 S.Ct. 617, 88 L.Ed.2d 598 (1986); *Mechanik*, 475 U.S. at 70 n. 1, 106 S.Ct. at 941-42 n. 1. Whether the grand jury was serving beyond its time is unrelated to the guilt or innocence of the defendants, so the authoritative resolution of their guilt at trial probably would not preclude making such a claim, if it is otherwise a ground for reversal. (Given the considerations discussed below, we need not decide whether "probably" is a necessary qualifier.)

Second, to the extent a resolution of factual guilt or innocence blots out a challenge to the procedures used before a grand jury, the defendants have lost their ability to pursue these claims already. They pleaded guilty, and a plea is as effective as a jury verdict in establishing factual guilt. *Tollett v. Henderson*, 411 U.S. 258, 93 S.Ct. 1602, 36 L.Ed.2d 235 (1973); *Brady v. United States*, 397

U.S. 742, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970). The imposition of sentence on the pleas will not eliminate any claim defendants now possess. Of course they may possess none, for the plea of guilty surrenders any objections to defects in the institution of the proceedings that could have been raised as defenses. See *Tollett*, *Brady*, and, e.g., *McMann v. Richardson*, 397 U.S. 759, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970). Perhaps defendants wish to present arguments along the line of *Menna v. New York*, 423 U.S. 61, 96 S.Ct. 241, 46 L.Ed.2d 195 (1975), and *Blackledge v. Perry*, 417 U.S. 21, 94 S.Ct. 2098, 40 L.Ed.2d 628 (1974); as the issue has not been briefed we do not say that the attack on the grand jury is forfeit. It is enough to say that imposition of sentence will not cause the defendants' position to deteriorate further.

Third, to the extent *Mechanik* bars review of grand jury questions on appeal from the final judgment, it does so because any errors are too insignificant to call for correction. If the errors are too insignificant after conviction, they are too insignificant before conviction. The Supreme Court has emphasized many times that criminal cases should not be interrupted by interlocutory appeals except in the most compelling circumstances. Multiple appeals produce leaden-footed justice and divert the time of courts from more pressing questions raised by other parties. See *Cobbledick v. United States*, 309 U.S. 323, 324-26, 60 S.Ct. 540, 541, 84 L.Ed. 783 (1940). Interlocutory appeals on the approach of *Abney v. United States*, 431 U.S. 651, 97 S.Ct. 2034, 52 L.Ed.2d 651 (1977), depend on the existence of a "right not to be tried"—in *Abney*, a right under the Double Jeopardy Clause. A "right not to be tried" is lost if not vindicated before trial. Defects in the initiation of the proceedings do not create "rights not to be tried". *Hollywood Motor Car* holds that objections to the procuring of an indictment may not be

raised by interlocutory appeal. Grand jury claims therefore may not be raised by interlocutory appeal. *United States v. LaRouche Campaign*, 829 F.2d 250 (1st Cir.1987); contra, *United States v. Dederich*, 825 F.2d 1317 (9th Cir. 1987). It may be that under *Mechanik* some claims are "lost" as a result of the trial. But this occurs, the Court emphasized, only when the results of the trial show that the claim was not serious to begin with. The possibility that a claim might be lost *because any error was harmless* is hardly a reason why the court should entertain an interlocutory appeal on the same subject. If that were enough to justify an appeal, every objection to a grant or denial of civil discovery would be appealable.

Many issues concerning discovery, class certification, the grant or denial of stays, and the disqualification of counsel are neither appealable before trial nor grounds for reversal after trial. E.g., *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, ___ U.S. ___, 108 S.Ct. 1133, 99 L. Ed.2d 296 (1988) (stays); *Flanagan v. United States*, 465 U.S. 259, 104 S.Ct. 1051, 79 L.Ed.2d 288 (1984) (disqualification of counsel in criminal case); *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 101 S.Ct. 669, 66 L.Ed.2d 571 (1981) (disqualification of counsel in civil case); *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 98 S.Ct. 2454, 57 L.Ed.2d 351 (1978) (class certification); *In re Schmidt*, 775 F.2d 822 (7th Cir.1985) (disqualification of counsel before grand jury). To say that a question may evade appellate review is not to say that it will evade *judicial* review; the district court has considered (and rejected) the defendants' contentions. If any error is sufficiently important to call for reversal on appeal from the final judgment, the defendants will have relief then; if it is not sufficiently material to call for reversal, there is no reason for appellate review at any time.

The appeal is dismissed for want of jurisdiction.

[1]* IN THE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA	)	
	)	85 CR 232
v.	)	
	)	Chicago, Illinois
ROOSEVELT DANIELS, et al.,	)	February 26, 1987
	)	Afternoon session
Defendants.	)	

TRANSCRIPT OF PROCEEDINGS
BEFORE THE
HONORABLE JAMES F. HOLDERMAN

APPEARANCES:

For the Government: HOWARD M. PEARL, VICTORIA J. PETERS and MARK D. POLLACK, Assistant U.S. Attorneys

For defendant Kenneth Johnson: GLENN SEIDEN

* * * * *

[9] MS. PETERS: I'll call the two attorneys that are involved and report back to Ms. Branch.

THE COURT: All right.

Let me just ask the Government, before you leave—

MS. PETERS: Oh, I wasn't leaving. We have got the Rone hearing for Troy Campbell that—

---

* Numbers in brackets refer to the Court Reporter's original pagination of the Transcript of Proceedings.

THE COURT: Okay. I guess before we leave the case of Kenneth Johnson, what is the Government's position with regard to this issue which you mentioned in your motion?

MR. PEARL: Judge, it's our position that in this case there's no question that the Court had jurisdiction irrespective of what might turn out to be the case with respect to the extension of the Grand Jury for the third indictment.

The first two indictments are unquestionably valid, which would grant this Court jurisdiction. The only possible issue would involve the additional counts added in the third indictment which applies only to Mr. Daniels, some telephone counts. I think they are valid, anyway.

I don't think it's a problem, but before we addressed all those issues, we thought we should apprise the Court first of the problem and, second, find out what the facts are.

MS. PETERS: This is something that we have only [10] recently learned about, and until we learn all the facts, it's hard for us to really articulate what our legal position is, because they are all fact-dependent.

THE COURT: All right. Well, let me know the next time we see one another.

MS. PETERS: Believe me, there are a lot of people in our office working on it.

THE COURT: All right.

[Certificate of the Official Court Reporter omitted in printing]

RECEIVED
MAR 3, 1987
FRANK J. McGARR
U.S. DISTRICT COURT
SENIOR JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN THE MATTER OF THE	)	
	)	Judge
SPECIAL OCTOBER 1984	)	Frank J. McGarr
	)	
GRAND JURY	)	

ORDER

On motion of the UNITED STATES OF AMERICA, by ANTON R. VALUKAS, United States Attorney for the Northern District of Illinois, the Court finds as follows:

1. On September 10, 1984, Acting Chief Judge Prentice Marshall entered an order calling for a special grand jury to be convened under 18 U.S.C. §§ 3331(a) and 3332(b). Pursuant to that order, the Special October 1984 Grand Jury was convened in October 1984.

2. In March 1986, the Special October 1984 Grand Jury voted unanimously to extend its term of service for an additional period of six months. The grand jury informed the deputy clerk of its decision, and instructed the deputy clerk to present a motion for a judicial order of extension. A motion to extend the grand jury was prepared by the United States Attorney's Office.

3. The foreman and other members of the Special October 1984 Grand Jury recall that they appeared before

this Court in March 1986, and that at that time this Court extended the grand jury's term of service.

4. The Court recalls that in March 1986 the Special October 1984 Grand Jury appeared before the Court, and the Court extended the grand jury's term of service.

5. As Chief Judge for the District Court of the Northern District of Illinois, I was familiar in March 1986 with the volume of business being conducted before the Special October 1984 Grand Jury.

6. In the six months following the Court's March 1986 extension of the grand jury's term of service, the Special October 1984 Grand Jury appeared on numerous occasions before this Court to return indictments and to conduct other business. This Court also entered orders substituting grand jurors to allow the grand jury to continue operations. On all of these occasions, the Court considered the grand jury to be a properly extended special grand jury, and the Court treated it as such.

7. The Court determined in March 1986, that the grand jury had additional matters to transact, had not yet completed its business, and should therefore be extended another six months.

8. Based on the Court's dealings with the Special October 1984 Grand Jury, and the Court's own recollections, the Court finds that it intended to, and did in fact order in March 1986 that the Special October 1984 Grand Jury continue to serve for an additional six months. This conclusion is supported by the fact that between March and September 1986 the Court considered the grand jury to be a properly extended grand jury, and it treated the grand jury as such.

9. The Clerk of the District Court for the Northern District of Illinois has been unable to locate a March 1986

judicial order extending the term of service of the Special October 1984 Grand Jury.

10. It now appears that, through inadvertence or mistake, a written extension order was not presented to, or executed by the Court, or that such an order was executed and has since been lost.

11. In view of the Court's contemporaneous determination that the grand jury had not completed its business, and in view of the Court's recollection that it extended the grand jury's term of service, the Court finds that any failure to enter a written extension order was non-substantive and ministerial.

12. In order that the record may "speak the truth" and reflect accurately the Court's original intentions and orders, it is necessary that the Court enter an order *nunc pro tunc* extending the term of service of the Special October 1984 Grand Jury.

13. THEREFORE, IT IS HEREBY ORDERED that the Special October 1984 Grand Jury be extended from March 25, 1986 to September 25, 1986.

14. Based on the *nunc pro tunc* order of extension entered herein and based on the other findings the Court has made in this order, the Court further finds and holds that the validity of all the indictments returned by the Special October 1984 Grand Jury during the period March 25, 1986, to September 25, 1986, is not affected by any failure to enter a written extension order in March 1986.

ENTER:

/s/ FRANK J. MCGARR

DATED:_____

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case Number: Date: MAR 3, 1987

Name of Assigned Judge: FRANK J. McGARR

Case Title: IN THE MATTER OF THE SPECIAL OCTOBER 1984 GRAND JURY

MOTION: GOVERNMENT'S MOTION TO COMPLETE DISTRICT COURT CLERK'S FILE.

DOCKET ENTRY:

(1) ☐ Judgment is entered as follows:

(2) ☒ [Other docket entry:]

ORDERED that the Special October 1984 Grand Jury be extended from March 25, 1986 to September 25, 1986 etc.

(3) ☒ Filed motion of [use listing in "MOTION" box above].

* * * * *

(12) ☒ [For further detail see ☐ order on reverse of ☒ order attached to the original minute order form.]

☒ No notices required.

* * * * *

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA	)	
	)	No. 85 CR 232
v.	)	
	)	Honorable
ROOSEVELT DANIELS, et al.	)	James F. Holderman

GOVERNMENT'S REPORT TO THE COURT CONCERNING THE MARCH 1986 EXTENSION OF THE TERM OF SERVICE OF THE SPECIAL OCTOBER 1984 GRAND JURY

Now comes the United States of America, by and through its attorney, ANTON R. VALUKAS, and submits the following report to the Court concerning the March 1986 extension of the term of service of the Special October 1984 Grand Jury.

On March 3, 1987, Judge Frank J. McGarr issued an order detailing the facts surrounding the March 1986 extension of the Special October 1984 Grand Jury. (Exhibit A). In March 1986, the Special October 1984 Grand Jury voted to extend its term of service for an additional six months. (*Id.* at par. 2). Judge McGarr, the foreman and other members of the grand jury recall that in March 1986, the grand jurors appeared before Judge McGarr, and that Judge McGarr extended the grand jury's term of service. (*Id.* at pars. 3-4). Judge McGarr stated in the order that although the Clerk's office has been unable to locate a March 1986 order extending the grand jury's term, "the Court finds that it intended to, and did in fact order in March 1986 that the Special October 1984 Grand Jury continue to serve for an additional six months." (*Id.* at pars.

8-9). Finding that "through inadvertence or mistake, a written extension order was not presented to, or executed by the Court, or that such an order was executed and has since been lost," Judge McGarr entered an order *nunc pro tunc* extending the term of service of the Special October 1984 Grand Jury from March 25, 1986 to September 25, 1986. (*Id.* at pars. 12-13).

Based on that *nunc pro tunc* order of extension and the other findings in that order, Judge McGarr held that "the validity of all indictments returned by the Special October 1984 Grand Jury during the period March 25, 1986, is not affected by any failure to enter a written extension order in March 1986." (*Id.* at par. 14).

Judge McGarr's *nunc pro tunc* order extending the term of service of the Special October 1984 Grand Jury and his finding that the indictments returned by that grand jury during its extended term are valid establish conclusively that the grand jury was properly extended and that the second superceding indictment in the case was validly returned. The validity of Judge McGarr's *nunc pro tunc* extension order is not a proper subject for an adversary proceeding. *Wax v. Motley*, 510 F.2d 318, 321 (2nd Cir. 1975).

For these reasons, the government respectfully requests that this Court deny defendants' petition for a writ of habeas corpus.

Respectfully submitted,

ANTON R. VALUKAS
United States Attorney

By: _____
Howard M. Pearl
Assistant United States Attorney

HMP/dc

EXHIBIT A

RECEIVED
MAR 3, 1987
FRANK J. McGARR
U.S. DISTRICT COURT
SENIOR JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN THE MATTER OF THE	)	
	)	Judge
SPECIAL OCTOBER 1984	)	Frank J. McGarr
	)	
GRAND JURY	)	

ORDER

On motion of the UNITED STATES OF AMERICA, by ANTON R. VALUKAS, United States Attorney for the Northern District of Illinois, the Court finds as follows:

1. On September 10, 1984, Acting Chief Judge Prentice Marshall entered an order calling for a special grand jury to be convened under 18 U.S.C. §§ 3331(a) and 3332(b). Pursuant to that order, the Special October 1984 Grand Jury was convened in October 1984.

2. In March 1986, the Special October 1984 Grand Jury voted unanimously to extend its term of service for an additional period of six months. The grand jury informed the deputy clerk of its decision, and instructed the deputy clerk to present a motion for a judicial order of extension. A motion to extend the grand jury was prepared by the United States Attorney's Office.

3. The foreman and other members of the Special October 1984 Grand Jury recall that they appeared before this Court in March 1986, and that at that time this Court extended the grand jury's term of service.

4. The Court recalls that in March 1986 the Special October 1984 Grand Jury appeared before the Court, and the Court extended the grand jury's term of service.

5. As Chief Judge for the District Court of the Northern District of Illinois, I was familiar in March 1986 with the volume of business being conducted before the Special October 1984 Grand Jury.

6. In the six months following the Court's March 1986 extension of the grand jury's term of service, the Special October 1984 Grand Jury appeared on numerous occasions before this Court to return indictments and to conduct other business. This Court also entered orders substituting grand jurors to allow the grand jury to continue operations. On all of these occasions, the Court considered the grand jury to be a properly extended special grand jury, and the Court treated it as such.

7. The Court determined in March 1986, that the grand jury had additional matters to transact, had not yet completed its business, and should therefore be extended another six months.

8. Based on the Court's dealings with the Special October 1984 Grand Jury, and the Court's own recollections, the Court finds that it intended to, and did in fact order in March 1986 that the Special October 1984 Grand Jury continue to serve for an additional six months. This conclusion is supported by the fact that between March and September 1986 the Court considered the grand jury to be a properly extended grand jury, and it treated the grand jury as such.

9. The Clerk of the District Court for the Northern District of Illinois has been unable to locate a March 1986 judicial order extending the term of service of the Special October 1984 Grand Jury.

10. It now appears that, through inadvertence or mistake, a written extension order was not presented to, or executed by the Court, or that such an order was executed and has since been lost.

11. In view of the Court's contemporaneous determination that the grand jury had not completed its business, and in view of the Court's recollection that it extended the grand jury's term of service, the Court finds that any failure to enter a written extension order was non-substantive and ministerial.

12. In order that the record may "speak the truth" and reflect accurately the Court's original intentions and orders, it is necessary that the Court enter an order *nunc pro tunc* extending the term of service of the Special October 1984 Grand Jury.

13. THEREFORE, IT IS HEREBY ORDERED that the Special October 1984 Grand Jury be extended from March 25, 1986 to September 25, 1986.

14. Based on the *nunc pro tunc* order of extension entered herein and based on the other findings the Court has made in this order, the Court further finds and holds that the validity of all the indictments returned by the Special October 1984 Grand Jury during the period March 25, 1986, to September 25, 1986, is not affected by any failure to enter a written extension order in March 1986.

ENTER:

/s/ FRANK J. MCGARR

DATED:_____

[Affidavit of Mailing and Service
List omitted in printing]

(Letterhead Of)

ROSS & HARDIES

March 9, 1987

By Messenger

Hon. Frank J. McGarr
U. S. District Court
for the Northern District
of Illinois
219 South Dearborn Street
Suite 1846
Chicago, IL 60604

Re: The Special October 1984 Grand Jury

Dear Judge McGarr:

I represent Roosevelt Daniels in Indictment No. 85 CR 232, pending before Judge James F. Holderman of this court, an indictment returned by the Special October 1984 Grand Jury. I have already filed motions before Judge Holderman and in the Seventh Circuit regarding the validity of indictments returned by that Grand Jury and particularly dealing with the questions involved in the alleged failure to properly extend that Grand Jury. Judge Holderman has scheduled a status report on my motion for March 12, 1987.

I am informed that you are in the process of entering some form of order relating to the previous lack of proper extension of that and other grand juries or have already done so. Such an order would significantly affect the constitutional rights of my client Mr. Daniels. I believe it would be improper for you to enter such an order without notice to all parties who might be affected, including,

particularly, my client. I believe you are now without jurisdiction as to that Grand Jury and you are without jurisdiction as to any indictments returned by that Grand Jury which are not pending before you. To the extent that you are attempting to or your orders may have the effect of impacting pending cases before other judges, I believe it would be a violation of the rights of the defendants in those cases for you to enter any order without notice, appropriate discovery and a hearing before a neutral judge. To the extent that you are making legal rulings, I believe it to be an improper exercise of your authority since my client's case is not assigned to you. To the extent that you are making a factual determination, you are in no different posture than any other witness and are not acting in a judicial capacity under those circumstances. I believe I have the right to take your deposition or such other discovery as may be appropriate under the circumstances to develop a complete factual record.

I wish to be heard in open court on this matter prior to your taking any action. If my information is incorrect and you have not been requested to, have not or do not intend to take any action regarding the Special October 1984 Grand Jury and any procedural orders relating thereto, I apologize for taking the court's time. If to your knowledge any other judge of the Northern District is contemplating such action, I request you furnish this letter to him or her and notify me of the identity of such judge and a time when I may be heard. While I do not represent any other defendants who I know at this time will be impacted by any such proposed action by you or any other judge, I reiterate my belief that prior to your taking any action you have an obligation to inform counsel for all defendants who might be impacted by such an order.

Respectfully submitted,

/s/ MICHAEL H. KING, P.C.
Michael H. King, P.C.

/c

cc: Hon. John F. Grady, Chief Judge
Marianne Jackson, Esq.
Douglas P. Roller, Esq.
Allan A. Ackerman, Esq.
Michael B. Cohen, Esq.
Glenn Seiden, Esq.
Thomas A. Durkin, Esq.
Chester Slaughter, Esq.
Douglas Morrison, Esq.
Howard M. Pearl, Assistant U.S. Attorney

(Letterhead Of)

UNITED STATES DISTRICT COURT

March 10, 1987

Mr. Michael H. King
Ross & Hardies
150 North Michigan Avenue
Chicago, Illinois 60601-7567

Dear Mr. King:

I have your letter of March 9 indicating that you represent a defendant in the district court and on his behalf have filed motions attacking the validity of indictments returned by the Special October 1984 Grand Jury.

In your letter, you indicate that you believe I am in the process of entering some form of order with regard to that grand jury situation, and assert your right on behalf of your client to appear and be heard on that subject.

Before receipt of your letter, I did enter an order with regard to that situation, which I regarded as ministerial and intended only to correct the record. I did not believe at the time that it was necessary to give notice or afford an opportunity to be heard.

Upon receipt of your letter, I have reconsidered the matter and it is still my decision that my order was appropriately entered without notice or hearing.

Sincerely,

/s/ FRANK J. MCGARR
Frank J. McGarr

bjb

cc: The Honorable John F. Grady
The Honorable James F. Holderman
Ms. Marianne Jackson
Mr. Douglas P. Roller
Mr. Allan A. Ackerman
Mr. Michael B. Cohen
Mr. Glenn Seiden
Mr. Thomas A. Durkin
Mr. Chester Slaughter
Mr. Douglas Morrison
Mr. Howard M. Pearl
Mr. Anton R. Valukas

[1]* IN THE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA	)	
	)	85 CR 232
v.	)	
	)	Chicago, Illinois
ROOSEVELT DANIELS, et al.,	)	April 22, 1988
	)	10:42 a.m.
Defendants.	)	

TRANSCRIPT OF PROCEEDINGS
BEFORE THE
HONORABLE JAMES F. HOLDERMAN

APPEARANCES:

For the Government:	DAVID J. STETLER HOWARD M. PEARL and VICTORIA J. PETERS Assistant U.S. Attorneys
For defendant Daniels:	JON K. STROMSTA and KURT H. FEUER
For defendant Sandra Campbell:	DOUGLAS P. ROLLER

[3] * * * * *

MR. STROMSTA: We did speak with Mr. Cohen and Mr. Durkin about dates on their calendars, and we have some proposed dates in the month of May.

* Numbers in brackets refer to the Court Reporter's original pagination of the Transcript of Proceedings.

THE COURT: Why so long? Why can't we—you know, I waited so that the Court of Appeals could make a determination. You have now attacked my waiting for the Court of Appeals to make its decision. Since that time you filed what is I consider a frivolous appeal. And in Mr. King's letter to me, he suggested that we change this date today.

Now, I assume that with that suggestion, that the defendants—and he was acting on behalf of all the defendants, I assumed—the defendants were ready to proceed at a prompt date thereafter.

MR. STROMSTA: The first dates that—we talked to Mr. Durkin and Mr. Cohen also—the 9th or the 11th—

THE COURT: Well, of course. That's in the middle of the Judicial Conference, when I'm scheduled to be in Indianapolis. That's why they are free on those dates.

MR. STROMSTA: Well, without those dates, then, it looks to be the 23rd or 24th of May.

* * * * *

[1]* IN THE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE:	)	
	)	Chicago, Illinois
THE SPECIAL OCTOBER, 1984 GRAND JURY.	)	Tuesday, March 11, 1986
	)	

TRANSCRIPT OF PROCEEDINGS
BEFORE THE
HONORABLE FRANK J. MC GARR,
CHIEF JUDGE

Court Reporter: MR. ANTHONY W. LISANTI,
United States Courthouse,
219 South Dearborn Street,
Chicago, Illinois, 60604,
312/939-2092

[2] THE CLERK: The Special October, 1984 Grand Jury.

The Special October, 1984 Grand Jury, in open court, this date, and a quorum being present, presents three big indictments.

THE COURT: Good afternoon, Ms. Foreman. Good afternoon, ladies and gentlemen. I haven't seen you for a while.

I will accept the return of three indictments, in open court. I will order them filed.

---

* Numbers in brackets refer to the Court Reporter's original pagination of the Transcript of Proceedings.

The first of these is 86 GJ 229, it names a single defendant, his name is John L. Johnson. And the bond set by the Magistrate will stand as the bond for Mr. Johnson.

The second indictment is 83 GJ 485, it names a single defendant. I will order the issuance of a warrant for the defendant. The bond will be $4,500 on recognizance.

The third indictment is 86 GJ 195, it names a single defendant. He has been detained by the Magistrate without bond, therefore, I will not set a bond.

Everything going well with your Grand Jury?

THE FOREPERSON: Fine.

THE COURT: Fine. Thank you. Resume your deliberations. The next time, you will find me in the other courtroom again.

[Certificate of the Official Court Reporter omitted in printing]

[1]* IN THE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE:	)	
	)	Chicago, Illinois
THE SPECIAL OCTOBER,	)	Tuesday, March 18, 1986
1984 GRAND JURY.	)	4:00 o'clock p.m.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE
HONORABLE FRANK J. MC GARR,
CHIEF JUDGE

Court Reporter: MR. ANTHONY W. LISANTI,
United States Courthouse,
219 South Dearborn Street,
Chicago, Illinois, 60604,
312/939-2092

[2] THE CLERK: The Special October, 1984 Grand Jury.

The Special October, 1984 Grand Jury, in open court, this date, and a quorum being present, presents two indictments.

THE COURT: Good afternoon, Ms. Foreman and ladies and gentlemen.

I will accept the return of two indictments, in open court, and order them filed.

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* Numbers in brackets refer to the Court Reporter's original pagination of the Transcript of Proceedings.

The first is 86 GJ 210, it names a single defendant. The bond set by the Magistrate will stand as the bond for that defendant.

84 GJ 1444 names two defendants. As to each of them, I will order the issuance of warrants. We will set their bail at $4,500 on recognizance.

I haven't seen you for a while. How are things going with your Grand Jury?

THE FOREPERSON: Fine.

THE COURT: On a rainy day like this, you might as well be inside working.

Any problems? Good. Resume your deliberations.

[Certificate of the Official Court Reporter omitted in printing]

[1]* IN THE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE:	)	
	)	Chicago, Illinois
THE SPECIAL OCTOBER, 1984 GRAND JURY.	)	Tuesday, April 1, 1986

TRANSCRIPT OF PROCEEDINGS
BEFORE THE
HONORABLE FRANK J. MC GARR,
CHIEF JUDGE

Court Reporter: MR. ANTHONY W. LISANTI,
United States Courthouse,
219 South Dearborn Street,
Chicago, Illinois, 60604,
312/939-2092

[2] THE CLERK: The Special October, 1984 Grand Jury.

The Special October, 1984 Grand Jury, in open court this day, and a quorum being present, presents one indictment.

THE COURT: Good afternoon, Ms. Foreman. Good afternoon, ladies and gentlemen.

I will accept the return of a single indictment, in open court, 86 GJ 286. It names a single defendant.

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* Numbers in brackets refer to the Court Reporter's original pagination of the Transcript of Proceedings.

We need not set a bond or issue a warrant, the defendant has already been detained by the Magistrate. I will order the indictment filed.

Everything going well with your Grand Jury?

THE FOREPERSON: Fine.

THE COURT: Fine. Thank you. Resume your deliberations.

[Certificate of the Official Court
Reporter omitted in printing]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN THE MATTER OF THE	)
	)
SPECIAL OCTOBER 1984	)
	)
GRAND JURY	)

ORDER

On motion of the UNITED STATES OF AMERICA by ANTON R. VALUKAS, United States Attorney for the Northern District of Illinois, and the Court being fully informed, the request to replace Randall Eakins and Jeffrey Hertzberg, both members of the Special October 1984 Grand Jury, for business reasons, is hereby granted.

ENTER:

/s/ FRANK J. MCGARR
JUDGE

MAR 3 - 1986

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case Number: Date: March 3, 1986

Name of Assigned Judge: Frank J. McGarr

Case Title: IN THE MATTER OF THE SPECIAL OCTOBER 1984 GRAND JURY

MOTION: ANTON R. VALUKAS
UNITED STATES ATTORNEY
219 SOUTH DEARBORN STREET
CHICAGO, ILLINOIS 60604

USA VINCENT J. CONNELLY

MOTION TO REPLACE RANDALL EAKINS AND JEFFREY HERTZBERG, BOTH MEMBERS OF THE SPECIAL OCTOBER 1984 GRAND JURY, FOR BUSINESS REASONS is granted.

DOCKET ENTRY: Enter Order

* * * * *

[1]* IN THE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA	)	85 CR 232
	)	
v.	)	Chicago, Illinois
	)	September 2, 1986
ROOSEVELT DANIELS, et al.,	)	11:00 a.m.
	)	
Defendants.	)	

TRANSCRIPT OF PROCEEDINGS
BEFORE THE
HONORABLE JAMES F. HOLDERMAN

APPEARANCES:

For the Government:	HOWARD M. PEARL, VICTORIA J. PETERS and MARK D. POLLACK Assistant U.S. Attorneys
For defendant Roosevelt Daniels:	MICHAEL H. KING JON K. STROMSTA ALLAN A. ACKERMAN
For defendant Edward Fitzgerald:	THOMAS ANTHONY DURKIN
For defendant Sandra Campbell:	DOUGLAS P. ROLLER
For defendant Kenneth Johnson:	JAMES A. GRAHAM

* Numbers in brackets refer to the Court Reporter's original pagination of the Transcript of Proceedings.

For defendant
Troy Campbell: MARIANNE JACKSON

For defendant
Lawrence Lee: MICHAEL B. COHEN

* * * * *

[33] Well, maybe the hearing, then, won't have an impact.

MR. KING: Your Honor, am I assuming you have denied my motion for a change of venue?

THE COURT: Well, you didn't file a written motion—

MR. KING: Yes, sir, that's right.

THE COURT: —and I think the last time I had indicated that if you want to file something in writing, you can—

MR. KING: Okay.

THE COURT: —but I will accept your motion today, contrary to what I told you earlier, I will accept your motion today as a motion to recuse me from this case, and I will deny that motion, because anything that I have learned about Mr. Daniels, I have learned in my capacity as a federal district judge, and the law is abundantly clear—I, myself, even attacked that law as a practitioner down in the Southern District of Alabama—the law is abundantly clear that I need not recuse myself. Frankly—

MR. KING: I'm glad that your Honor agrees with the issue, though.

THE COURT: I said I attacked it. I did not win. The Eleventh Circuit agreed with the Government on that.

All right, with regard to the defendant Campbell's motion to suppress the electronic surveillance, [34] I have reviewed the materials that have been submitted to me.

MR. KING: Your Honor, excuse me. I think that with respect to the Campbell motion for electronic surveillance, that was—I assume that that motion was filed on behalf of Mr. Daniels also. To the extent that it has not been, we join in that motion, so whatever rulings or pronouncement the

Court wanted to make, they should apply additionally to defendant Daniels.

MR. COHEN: Defendant Lee also joins in that motion to suppress.

MR. DURKIN: As does—

MR. GRAHAM: Defendant Johnson would also, Judge.

MR. MORRISON: As to defendant Rena Johnson, as well.

MR. DURKIN: As does defendant Fitzgerald.

MS. JACKSON: And Troy Campbell.

Your Honor, I think the motion says it's brought on behalf of Ms. Campbell and all the defendants.

THE COURT: It does. That's why I just referred to it as that. I will call it defendants', and you can put the apostrophe after the "s" if you desire. It's a motion to suppress electronic surveillance. I have reviewed the materials that have been submitted to me, and I find that under the circumstances presented here, defendant Daniels [35] consented to the recording of the conversations which the Government seeks to use.

It is clear to me that under the circumstances under which these recordings were made, under the circumstances under which the telephone was utilized by Mr. Daniels, his consent was clear. No further hearing is necessary. I feel strongly that the interceptions were proper under Title 18 United States Code Section 2511(c)(2), but to complete the record, I continue to review the Title 3 objections, and I find that there was sufficient probable cause presented to Judge Grady for the Title 3 wiretap, that the Government adequately established the need for the electronic surveillance utilized in the course of this investigation, and that the order authorizing the interception complied with the requirements of Title 3.

The defendants' nonspecific argument with regard to the failure to minimize is inadequate and insufficient to require a hearing thereon.

Furthermore, institutional phones utilized by inmates under these circumstances, in my opinion, offer inmates no expectation of privacy. It's clear. I, myself, even before this motion was presented, observed the notices that are placed at the Metropolitan Correctional Center. I observed those when I was a defense lawyer before this Court.

I think that there is no reasonable expectation [36] of privacy with regard to those.

But the basis of my holding is that Mr. Daniels consented and, therefore, the motion is denied.

MR. KING: Your Honor, may I ask a question about that?

THE COURT: Sure.

MR. KING: When you say that Mr. Daniels consented, you are referring to the notice in the consent form?

THE COURT: I'm referring to all the facts and circumstances that are present in the record in this case.

MR. ROLLER: Your Honor, there was an additional matter raised in the motion having to do with our request for an evidentiary hearing under Franks v. Delaware based upon material misrepresentations and omissions, and, in particular, your Honor, the fact that omitted from the affidavit—and this relates to what you have already spoken to—but omitted from the affidavit was any reference to the continued monitoring of Mr. Daniels' conversations by the MCC and receipt of those, although, according to the unsworn information provided to us so far, they were not reviewed. Nevertheless, there were an additional 11 recordings up until two weeks prior to the application.

THE COURT: Right, I understand, but the ruling that I have made today deals with consent. That's the thrust of my ruling, that Mr. Daniels consented to the tape [37] recording.

MR. ROLLER: Well, maybe I misunderstood your Honor. Are you prepared at this point in time to grant

the defendants an evidentiary hearing on any aspect of the motion to suppress electronic surveillance?

THE COURT: It is not necessary because the information that has been presented to me, there's been no denial that Mr. Daniels signed the statement that Mr. King referred to. There is no denial that the other circumstances upon which the Government has premised its position that Mr. Daniels consented in fact did not occur.

MR. KING: Your Honor, if I can briefly respond to that, we got the Government's response—

THE COURT: Yes?

MR. KING: —and we have not yet had an opportunity to reply, and the Government's response, if you look at the affidavit submitted in support of their response by I believe Lt. Reed, one of the paragraphs makes clear that all inmates, when they check into the institution, are required to sign the consent form. That's not a knowing consent form in any meaningful sense.

THE COURT: I considered that.

MR. KING: Well, but, that issue has not been articulated before you because the Government only argued that in its reply. If you considered that and you base your—

[38] THE COURT: I considered that.

MR. KING: If I may finish?

If you considered the consent as knowing and voluntary, and you are denying a hearing on that, fine, I just want the record to be clear on that. A required executed consent form is not a knowing consent form, and to the extent that there is any consent, it is a limited consent to the institutional—security of the institution. It has got nothing to do with an ongoing investigation by the MCC and FBI officials, but if your Honor has considered that and rejected it, then the record is clear, and that's all we—

MR. ROLLER: The only other matter I wanted to make on the consent issue, your Honor, is that I was planning, quite frankly, to address the Government's response, which I was not able to get until 4:30 on Friday, to our motion—

THE COURT: I didn't get it until that time on Friday, too, so—

MR. ROLLER: Fine. I was going to address that initially verbally and then with a written response.

The only thing I wish to point out to the Court in connection with the consent is that the Government did not address, distinguish, or in any other way come up with any cases contrary to United States v. Dalia, the principal case relied upon by the defendants that clearly [39] stated that these circumstances, in a federal correctional institution, assuming signature by an inmate, assuming the exact same notices, that it was not consent, and the Government did not provide—did not even mention Dalia in their reply.

But what I was referring to a few moments ago, your Honor, was that if, in fact, the Court has found that there was consent and therefore the interceptions were lawful, there is the issue that we raised in our motion that therefore, if you were to find that they were lawful, that the omissions of the continued interceptions by the MCC, and the Government having those, were material, clearly intentional, omissions from the affidavit, that entitles us, under Franks v. Delaware, to inquire further into it.

So we are beyond the consent. We are at the Franks v. Delaware issue having to do—I mean there's no question, Judge. The Government said we didn't present any affidavits. We didn't have to. We presented their own discovery material indicating that they had received these tapes through August 9th, that they had not reviewed

them, and that they hadn't even bothered telling Judge Grady that they had those.

If, in fact, the conversations were lawful, one of the things that Judge Grady was obligated by the statute to do was to make a determination of whether or not there [40] was a need for the electronic surveillance. He couldn't possibly have done that without knowing to what extent the Government was continuing to wiretap or continuing to monitor and record those conversations and what Daniels was saying on those conversations.

So, therefore, even though your Honor has found that he consented, I submit to the Court that we are still entitled to an evidentiary hearing on that issue.

Thank you.

THE COURT: All right, is there anything further?

MR. KING: I think the record is clear, but in case there is any doubt in anybody's mind, Mr. Daniels affirmatively asserts that he did not knowingly consent.

THE COURT: Well, I didn't see an affidavit to that—

MR. KING: We'll be happy to supply one. And the Court said the Court doesn't need a hearing.

THE COURT: I have already ruled on the basis of the materials that were submitted to me—

MR. KING: I understand, your Honor.

THE COURT: —in determining whether—

MR. ROLLER: We did specifically say that—I'm sorry—we did specifically say he did not consent.

THE COURT: I understand your legal position that he did not consent, but I did not see a factual affidavit to that effect.

* * * * *

[Certificate of the Official Court Reporter omitted in printing]